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No. 92-1402

Supreme Court, U.S.
FILED

AUG 23 1993

OFFICE OF THE CLERK

In The

Supreme Court of The United States

October Term, 1993

**C & A CARBONE, INC.
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and
ANGELO CARBONE,**

Petitioners,

vs.

TOWN OF CLARKSTOWN,

Respondent.

**On Writ of Certiorari to the Supreme Court
Appellate Division, Second Department
of the State of New York**

**AMICUS CURIAE BRIEF OF ROCKLAND COUNTY
IN SUPPORT OF RESPONDENT**

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OF
ROCKLAND, INC and ANGELO CARBONE,

Petitioners,

-- v. --

THE TOWN OF CLARKSTOWN,

Respondent.

BRIEF OF THE COUNTY OF ROCKLAND
AS AMICUS CURIAE SUPPORTING RESPONDENT

The respondent Town of Clarkstown (hereinafter "Town") is located within the County of Rockland ("County"). The amicus County is responsible for the planning, development and implementation of solid waste management in the county and which presently anticipates the expenditure of 60 million to 85

million dollars in solid waste capital projects, the viability of which may well hinge on the Court's ruling in this case.

A decision of this Court which extinguishes local government's power to direct solid waste to designated facilities, as through a "flow control" ordinance, will imperil Rockland County's solid waste management efforts. Therefore, the County respectfully submits this amicus curiae brief, urging affirmance.

STATEMENT OF THE CASE

The facts pertinent to the dispute between the parties have been fully set forth in their respective briefs. The County adopts herein the facts as stated by the respondent Town of Clarkstown.

From the standpoint of the amicus County, it is critical that the Court affirm the fundamental responsibility of local government to regulate and manage local solid waste. The degree of management of waste can range from the incidental regulation of local private trash collectors to total municipal collection and disposal. Nevertheless, the ultimate responsibility for the health, safety and welfare of local citizens lies with local governments who strive, within

the limits of their resources and skills, to do what they deem best for their citizens.

Rockland County Solid Waste Management

Rockland County has expended more than two million dollars (\$2,000,000) in solid waste planning. Its solid waste management plan ("plan") analyzes the county's solid waste condition and establishes a strategy for rationally, and effectively, managing this waste. The plan includes provision for the following subcomponents of solid waste:

- medical waste
- construction and demolition debris
- residential curbside recyclables
- commercial recyclables
- compostable sewage sludge
- compostable leaves, brush & wood chips
- non-recycled "refuse"
- household hazardous waste

As part of the County's overall plan, the County endeavors to site three major solid waste facilities: a "materials recovery" facility; a "sludge co-composting" facility; and a "construction & demolition debris/mixed bulky waste" facility. The estimated cost for these three facilities is between 60 and 85 million dollars. In order to obtain financing for the construction of these facilities, the County must ensure that locally-generated waste be delivered, that is "flow", to its facilities.

Facility Financing

Throughout the nation, financing solid waste facilities depends on an assurance of a supply of waste.¹ Essentially, there are only limited means of assuring this supply. Flow control or designation ordinances are one proven device. Municipal collection, or the creation of a refuse district, authority or public corporation, are other means.

Using a flow control ordinance, waste is directed to a designated waste management facility and delivery ("tip") fees are paid at the facility's

¹ It would be both politically unacceptable and fiscally irresponsible to construct a waste facility at great taxpayer cost, and then underutilize it.

gate. Using the other means of waste management, disposal charges are paid prior to delivery, typically by a tax bill or special assessment.²

Whatever the means of municipal waste management that may be employed, the end result is that local waste is sent to locally-designated facilities for processing or disposal. The waste may never be exported from the jurisdiction at all, for example, if it is landfilled or incinerated.³

² Prior payment of disposal fees, through ad valorem taxes, special assessment, user fees or the like is sometimes called "economic flow control" because the delivery cost is minimal or nothing since local citizens have paid in advance.

³ As the municipality may concededly do, at its option.

Otherwise, it is only after the municipality has completed its waste management activities (e.g., recycling, composting or consolidation at a transfer station) that it is appropriate to consider placing the recyclables, the compost, or the consolidated garbage into the solid waste marketplace.

Amicus County's planned recycling facilities are a vital part of the County's solid waste management plan. Without them, the County will be forced to rely on the uncertainties of the waste disposal marketplace. Absent the ability to act responsibly and control its own waste destiny, the implementation of the County's solid waste management plan may become fiscally oppressive to the County's

taxpayers as the disposal of waste becomes ever more difficult and costly.

SUMMARY OF ARGUMENT

Local municipal solid waste management and disposal is traditional governmental activity. It is not protectionist and violates neither the spirit nor the letter of the Commerce Clause.

Local waste management must be distinguished from local interference with waste moving in interstate channels of commerce. For example, import restrictions are often properly regarded as protectionist. To the extent that they may seek to "protect" a locality by interfering with private transactions concerning out-of-state

waste which may enter the local jurisdiction--waste which is "in commerce"--they are unconstitutional. See, Philadelphia v. New Jersey and Fort Gratiot Landfill, Inc. v. Michigan Department of Natural Resources, infra.

Management of local waste through "flow control" requires local management of locally generated solid waste at designated facilities. Flow control⁴, sometimes called "designation", is readily distinguishable from the type of import restrictions found in Philadelphia and Fort Gratiot. Flow

⁴ Petitioners attempt to define flow control as any interference with waste flow. This mischaracterizes the term. As used in this brief, and as the term is generally used, "flow control" means flowing locally-generated solid waste to municipally-designated waste management facilities.

control allows local dominion over municipal waste, a legitimate health and safety endeavor, before such waste ever becomes an article of interstate trade. By directing local waste to specific facilities, flow control allows government to finance its solid waste facility for community use, thus insuring the facility's use if, for example, cheaper short-term alternatives exist elsewhere. In addition, the local facilities may completely dispose of the waste, as through landfilling or incineration, and therefore eliminate any potential waste "commerce" in the waste thus disposed.

If every community in the United States enacted flow control requiring, in the first instance, the local community to attempt to manage its own

waste, this would give each an opportunity to solve its own waste problem through waste reduction, reuse or recycling. Such universally local waste management would be no different from universally local management of fire, crime and sewage. If the community falls short of its waste management goals, it need only send the unmanaged waste out into the constitutionally protected channels of interstate commerce.

Flow control is a simple, democratic and equitable means of solving a national problem through local efforts and waste self-determination.

ARGUMENT

I. EXCLUSIVE LOCAL MANAGEMENT OF LOCAL SOLID WASTE, WHETHER USING A "FLOW CONTROL" ORDINANCE OR OTHER MEANS, IS A CONSTITUTIONALLY PERMISSIBLE ACTIVITY OF MUNICIPAL GOVERNMENT

Solid waste and civilization have evolved together. Through modern science, we have come to realize the basic necessity of proper waste management, not merely to eliminate odors and disease, but also to avoid groundwater contamination, conserve energy, protect stratospheric ozone and save forests.

Like municipal provisions for fire, police and sewer services, local solid waste management (in its most basic form, the garbage collection at issue in this case) is an essential

public service, and primarily a local concern.⁵

A. The Local Role in Local Waste Management is Primary

Waste management is an important function of local government, and vital to the integrity of the local community. It is a function traditionally, and by federal statute,

⁵ Hybud Equip. Corp. v. City of Akron, Ohio, 654 F.2d 1187, 1192 (6th Cir. 1981)("[c]ontrol of local sanitation, including garbage collection and disposal, like fire and police protection, is a traditional, paradigmatic example of the exercise of municipal police powers reserved to state and local government under the Tenth Amendment...."), vacated on other grounds, 455 U.S. 931 (1982)(emphasis added); see also, National League of Cities v. Usery, 426 U.S. 833, 855-56 n.20 (1976), overruled on other grounds, Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528 (1985).

reserved to state and local governments.

As Congress has expressly declared, "the collection and disposal of solid wastes should continue to be primarily the function of state, regional and local agencies." Resource Conservation and Recovery Act (RCRA) Sec. 1002(a)(4), 42 U.S.C. Sec. 6901(a)(4). If local government was, and is, to "continue" to be responsible for "collection and disposal," Congress certainly could not have intended to deny local government the ability to continue to manage local solid waste. Nevertheless, this will result if the Court denies municipalities the right to use flow control or similar means to "collect and dispose" of local waste.

There are very limited means for a

municipality to manage waste. One means is flow control, which directs local waste to locally-designated facilities. The creation of a utility, or a refuse district, or municipal collection are other means. Each of these latter variations has the same result, vis-a-vis the solid waste involved: each causes solid waste to flow to municipally-designated facilities for "collection and disposal."

It is self-evident that municipal waste collection and disposal (landfilling, incineration) completely deprives private merchants of garbage. Thus, if private industry has a constitutional "right" to such waste, as Petitioners' amici argue, then the means of collection and disposal is

immaterial. Taken to its logical conclusion, all means of municipal control which deprive the garbage industry of waste would be considered equally offensive, and attempts at waste reduction, reuse and recycling would have to be abandoned as violative of the rights of the trash "merchants". Individuals would ultimately be encouraged to maintain the same high American level of waste generation and deterred from helping to reduce garbage proliferation. This is an absurd view which is legally untenable.

B. Local Garbage, Ideally, Never Becomes an "Object of Interstate Trade"

This Court has never visited the issue of when solid waste becomes a part of interstate commerce. It is

respectfully submitted that the Court should consider this question, and find that there is no per se constitutional right to garbage, as "commerce," because locally managed local waste is simply not an "article of commerce."

a. Banning "objects of trade" is protectionist

This Court has clearly stated that "[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 504 U.S. ___, 112 S.Ct. 2019, 2023 n.3 (1992) citing Philadelphia v. New Jersey, 437 U.S. 617 (1978). As stated in Fort Gratiot, "whether the business arrangements between the out-of-state generators of

waste and the [private site operator] are viewed as 'sales' of garbage or 'purchases' of transportation and disposal services, the commercial transactions unquestionably have an interstate character." 504 U.S. at ___, 112 S.Ct. at 2023.

Both Fort Gratiot, supra and Philadelphia, supra, involved waste which was unquestionably an "object of trade" where significant commercial interests were stymied at one state's border through a discriminatory import ban. Absent court intervention, such trade would cease and retaliatory garbage barriers likely erected.

While the transportation and disposal of garbage certainly constitutes a multi-billion dollar business, the waste industry is not,

however, entitled under the Commerce Clause to hinder local government's efforts to manage, reduce and eliminate municipal solid waste.

b. Local waste does not become an "object of interstate trade" until exported; it is not an object of any trade when managed, reduced or eliminated municipally

Local waste management is distinguishable from protectionism. The garbage industry has no right to waste which is reduced, recycled, eradicated or otherwise managed locally, because waste does not become an "object of interstate trade" until it is actually traded. Otherwise, any efforts at waste reduction, reuse or recycling would impermissibly interfere with constitutionally protected commerce. See, I.A., supra.

There is nothing said in Philadelphia or Fort Gratiot which indicates that it is impermissible for local government to manage local waste, and certain references indicate the contrary.⁶ To a casual observer, local garbage sitting at a curb, or being trucked to the local landfill, is not an "object of interstate trade." On the other hand, garbage in a truck destined for a distant landfill or waste-to-energy plant would certainly appear to be such an object of commerce.

Herein lies the distinction. It

⁶ See, e.g., Philadelphia, supra, 437 U.S. at 627; Fort Gratiot, supra, 504 U.S. at __, 112 S.Ct. at 2023, n.3.

is the failure or inability of the local government to manage the waste, necessitating the interstate movement of the waste, which creates the "commerce" protected by the Commerce Clause. The interstate garbage market is available to grapple with the unmanaged waste for a fee. However, if the waste can be eliminated at the source, or managed locally, through incineration, recycling, composting or the like, then the need for an interstate transaction never arises, and the solid waste never becomes an object of interstate trade. Waste is, by definition, unlike merchandise, commodities or raw products which are items of value sought for commerce. Waste is waste, for otherwise it would be sold for profit by its generator.

Only waste merchants seek waste, because they profit by offering disposal services.

The view that waste is not per se an "article of commerce" is not a novel concept. Sewage waste, for example, is disposed of locally. In Town of Hallie v. City of Eau Claire, 471 U.S. 34, 37, 42 (1985), this Court upheld a municipality's right to directly control the flow of sewage and, as against an antitrust challenge, went on to uphold the monopoly in municipal sewage treatment services and "tying arrangements" in waste collection and transportation. Sewage is a waste akin to solid waste, and sewage sludge is a type of solid waste. It would be quite anomolous to allow sewer districts to control the flow of sewage, but to deny

garbage districts this means of waste control.

In Sporhase v. Nebraska ex rel Douglas, 458 U.S. 941 (1982), this Court examined the issue of whether groundwater, indisputably a valuable commodity, was an "article of commerce" and determined that it was. However, the dissent raised an important distinction between regulating "commerce" and denominating materials as articles of commerce. The two concepts are different. Waste need not be considered as an article of commerce when locally managed, even though Congress certainly can, and does, regulate waste management as "affecting commerce."

The Commerce Clause principles enunciated in Philadelphia and Fort

Gratiot are not that local government cannot endeavor to solve local waste problems by managing or eliminating solid waste, but rather that discriminatory restrictions smacking of protectionism are improper when they interfere with the commerce of interstate waste disposal.

There is a fundamental difference between the type of protectionism which this Court found offensive in Philadelphia and Fort Gratiot, and non-discriminatory, self-deterministic "home rule" over garbage. The Commerce Clause requires that the peoples of the several states must sink or swim together, even in our collective

garbage.⁷ Distinguishing waste which is locally managed, as through flow control, from waste which has been placed into the interstate garbage marketplace, will allow us all to swim rather than sink.

II. "FLOW CONTROL" ALLOWS SOLID WASTE SELF-DETERMINATION

Flow control allows environmentally sound and economical management of solid waste. It is not "protectionist", but rather serves to protect health, welfare and the environment without "Balkanizing" the

⁷ Paraphrase of L. Tribe's gloss on Justice Cardozo's summation in Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935). L. Tribe, AMERICAN CONSTITUTIONAL LAW 426 (2d Ed. 1988).

Union or isolating individual states from the national solid waste problem.⁸ Flow control ordinances help solve the solid waste problems at the source. They allow the development and financing of locally-crafted solutions to handle locally generated waste.

The legality of flow control has long been recognized by this Court. In California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 305 (1905), this Court expressly approved of municipal garbage flow control, against

⁸ Extend the reasoning to international relations. Suppose Canada decided to manage all the solid waste it generates within its own borders. Should the United States "retaliate" by managing all the waste within our borders, perhaps through waste reduction, reuse or recycling?

a due process challenge, when it allowed San Francisco to award an exclusive franchise for waste collection and disposal at a city-designated site.

Extending the California Reduction holding further, if a city were able to direct all local garbage to local facilities capable of completely eliminating the waste -- through reduction, recycling and composting--this achievement should not be viewed as a Commerce Clause violation. Rather, it should be applauded. Waste elimination is not an interference with commerce. Rather, it helps commerce by reducing the economic inefficiencies, environmental damage, and other "externalities" associated with waste.

Perhaps most importantly, our very

democracy is impaired if a community is prohibited from waste self-help. Local voters should be able to choose to install progressive waste facilities, and to direct community waste to these facilities. Private merchants should have no standing to challenge this. It is simply undemocratic, under the cover of a dormant Commerce Clause justification, to deny waste self-determination to local government. Cf. U.S. Constitution, Art. IV, Sec. 4 (Guaranty Clause).

Flow Control as a Favorite (and Possibly Best) Tool

By directing waste to a municipal facility through "flow control", a supply of waste and therefore a source of tipping fee income, can be guaranteed. Facility bondholders re-

quire this or similar guarantees, such as a bond backed by local taxpayers. The benefits of flow control are twofold. First, it guarantees waste flow to a facility. This is the same guarantee which can be given by a garbage district, utility, authority, using "economic flow control", or by municipal collection.

The second benefit to flow control is that the "tipping fee" charged reflects the "real costs" of environmentally proper disposal. Because waste is directed by law to the facility, the facility can charge the actual or "real" cost of disposal, by factoring in both the long-term costs of waste disposal, and the "external" costs of improper disposal. Alternatives to flow control, such as tax

assessment, still will cause waste to flow to designated facilities (because the tip fee can be reduced to zero). However, the direct relationship between delivery and payment is lost, and consequently there is less incentive to reduce or recycle the waste.

Federalism and local waste management

Congress, through the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. Sec. 6901 et seq., has allowed the states to become solid waste laboratories, and thus left them the responsibility and ability to experiment in solving the solid waste

crisis.⁹ This is consistent with the traditionally local nature of solid waste management, and with basic concepts of American federalism. The Court should uphold flow control because it achieves the same waste flow ends as municipal collection or other means of local waste control.

Petitioners characterize the issues present in this case as narrow--whether solid waste import restrictions are equivalent to local management of local waste, and therefore equally impermissible. As argued in this

⁹ Cf. Reeves, Inc. v. Stake, 447 U.S. 429, 441 (1980) (applying commerce clause to South Dakota's innovative approach to local cement shortage would diminish the value of the states as social and economic laboratories).

brief, there is a profound difference which favors upholding flow control and equivalent means of managing local waste.

If the historical and RCRA-sanctioned role of local government in managing local waste is to be abandoned, this is the exclusive prerogative of Congress. As noted 50 years ago by Justices Black, Frankfurter and Douglas:

"Judicial control of national commerce--unlike legislative regulations--must from inherent limitations of the judicial process treat the subject by the hit-and-miss method of deciding single local controversies upon evidence and information limited by the narrow rules of litigation. Spasmodic and unrelated instances of litigation cannot afford an adequate basis for the creation of integrated national rules which alone can afford the full protection for interstate commerce intended by the Constitution.

McCarroll v. Dixie Lines, 309 U.S. 176, 188-89 (1940) (Black, Douglas and

Frankfurter, JJ, dissenting). Clearly, it is not unconstitutional for local government to manage local waste.

CONCLUSION

Municipal management of solid waste is not a commercial activity and the garbage involved is not an article of commerce. Therefore, local government can manage, and to the extent feasible, reduce, recycle and eradicate local solid waste without running afoul of the dormant Commerce Clause. This is consistent with traditional notions of federalism, and RCRA's deference to state and local government in solid waste management. Flow control allows waste self-determination, either by managing the waste locally, or by sending it out into the protected

stream of interstate commerce.

Therefore, the decision of the Appellate Division should be affirmed.

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